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The Institutionalization of Conflict in the Reform of Schools: A Case Study of Court Implementation of the PARC Decree†

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For the past four years Judge Edward R. Becker, sitting on the United States District Court for the Eastern District of Pennsylvania, has been negotiating the disputes among the parties involved in the implementation of the decree in *Pennsylvania Association for Retarded Children v. Pennsylvania.*[1] The decree is based on a consent agreement growing out of a class action suit brought by the Pennsylvania Association for Retarded Children (PARC) against the Commonwealth of Pennsylvania and defendant school districts. The suit was brought on behalf of those retarded children excluded from the public schools because of their presumed inability to benefit from an education.[2]

The case is representative of a growing number of class actions that have come to the federal courts in the past three decades. The plaintiffs in these cases are frequently members of what commentators call unprepossessing groups, such as minorities, mental patients, prisoners and the handicapped, who experience exclusion, deprivation, or some form of differential and unfair treatment.[3] As in the benchmark case of *Brown v. Board of Education,*[4] these groups ask the court to change the practices of a public bureaucracy whose operations allegedly result in the denial of their constitutional rights.

During the past twenty-five years the number of cases calling for institutional remediation has increased. The expansion of state functions, the

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[1] 334 F. Supp. 1257 (E.D. Pa. 1971), *approved and adopted*, 343 F. Supp. 279 (E.D. Pa. 1972) [hereinafter cited as PARC v. Pennsylvania].

[2] *Id.*

[3] Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

[4] 347 U.S. 483 (1954).

efforts of minorities to secure their rights, the consequent widening of the umbrella of equal protection through the courts and acts of Congress as well as the relaxation of procedural requirements for bringing class actions have all contributed to the rise of such cases.[5] Despite the considerable success of the federal courts in establishing the constitutional rights of the disadvantaged, their efforts to reform institutions on the basis of court orders have been less successful.[6] Even when legislation has subsequently reinforced and clarified the original judicial mandates, institutional reform has not necessarily resulted.[7]

Suits involving institutional reform have presented the federal judiciary with a variety of problems.[8] Aside from substantive and procedural legal issues and the tension between judicial restraint and judicial activism,[9] concerns beyond the scope of this article, these suits have raised two important questions: first, how can judicial remedies be designed to resolve what are essentially political disputes? And second, how can courts with limited resources and a narrow range of effective sanctions enforce their decisions on intractable bureaucracies? These questions are not concerned with whether the federal courts should intervene in cases of institutional reform, but with their capacity to do so and with the effects of their efforts on the remedial process.

The formulation of appropriate remedies in such cases is highly problematic because they differ markedly from those applicable in traditional private litigation, in which the means of resolving the dispute are clearly determinable. In such traditional private cases the court may require one party to give financial restitution to the other or, based on an evaluation of a set of completed events, may order one party to stop some action or form of behavior that it determines is unfair or injurious. In the remediation of institutions, however, a successful remedy is more elusive. In these cases the court is generally being asked to compel an

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[5] Kirp, *Law, Politics, and Equal Educational Opportunity: The Limits of Judicial Involvement*, 47 HARV. EDUC. REV. 117 (1977).

[6] For discussions of the problems of implementing court ordered remediation in a variety of institutions, see J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); Lottman, *Paper Victories and Hard Realities*, in PAPER VICTORIES AND HARD REALITIES (V. Bradley & G. Clark eds. 1976); Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).

[7] Despite the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1411-20 (1976 & Supp. IV 1980), and the detailed regulations of the Office of Special Education and Rehabilitation Services, 34 C.F.R. §§ 300.1-.754 (1980), which contain detailed regulations for educational programs for the handicapped, there has been virtually uninterrupted litigation under the PARC case and Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972).

[8] For discussions of the full range of problems, see Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978); Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977).

[9] These problems were recently analyzed by Fiss, *The Supreme Court, 1978 Term—Foreward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

organization to do something it is not presently doing. The relief sought might be a guarantee of equal educational opportunities where discrimination exists, as in *Brown v. Board of Education*,[10] or the structuring of adequate institutional care where, as claimed by the plaintiffs in the Willowbrook case, neglect and deprivation predominate.[11] Frequently, to accomplish these results, the offending organizations must make extensive changes in their practices, their personnel, and the disposition of their resources. The court is being called upon to perform legislative functions as it attempts to control a complex series of future acts in anticipation of their outcomes.[12] The court's departure from its customary adjudicatory function is complicated by the lack of consensus concerning precisely what institutional changes will achieve the ends sought by the aggrieved parties. In most cases, defendants, plaintiffs, and independent experts are likely to hold differing views regarding the facts to be considered and precisely what actions will comply with a legislative act or a judicial decision.

The courts must formulate decisions predicated on social rather than historical facts, on anticipated rather than past events. In many cases, however, the ability of the courts to collect the pertinent data, the capacity of the judge to interpret it, and the suitability of the collected facts as reliable and valid predictors of social processes are all questionable.[13] Further, to the extent that the courts in prescribing a remedy must provide substantive definitions of abstract terms such as "adequate treatment" or "appropriate education" when no agreed upon standards exist, they are being asked to choose among competing theories and values. Nevertheless, because the claims of disadvantaged groups have had relatively broad support in the polity and because they have been able to establish their rights through the courts and the legislative process, judges have been drawn into more activist roles. It is not uncommon for a set of orders to consist of eighty-four standards to guide organizational practice or twenty-nine pages of instructions covering twenty-three areas of operation.[14] When remedies require such complex orders, courts must maintain jurisdiction over the case and find mechanisms for supervising the implementation of those orders. Consequently, their involvement with the case is prolonged and deepened.[15]

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[10] 347 U.S. 483 (1954).

[11] New York State Ass'n for Retarded Children, Inc. v. Carey, 409 F. Supp. 606 (E.D.N.Y. (1976), *further implementing the consent judgment*, 393 F. Supp. 715 (E.D.N.Y. 1975) (popularly known as the Willowbrook case).

[12] Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[13] D. HOROWITZ, *supra* note 6, at 47-56, 274-76, 282-83.

[14] For a discussion of orders in Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), and New York State Ass'n for Retarded Children, Inc. v. Carey, 409 F. Supp. 606 (E.D.N.Y. 1976), *further implementing the consent judgment*, 393 F. Supp. 715 (E.D.N.Y. 1975), and the difficulties of monitoring implementation, see Lottman, *supra* note 6, at 94.

[15] Chayes, *supra* note 12, at 1298-1301.

This prolonged involvement on the part of the court does not guarantee successful institutional reform. Even under the best circumstances, complex organizations are slow to change on their own, and judges have few effective means of compelling these organizations to comply with court orders.[16] Although the right of the courts to continue their jurisdiction and issue further orders in these cases is established in the law,[17] the means of supervising the implementation of court orders and translating them into organizational practice are not thoroughly institutionalized.

Judges who issue "omnibus" decrees and assume the responsibility of supervising the implementation of their orders must make certain choices with the knowledge that no choice guarantees success and that there are significant factors affecting implementation over which they have little control. In considering how to proceed, judges have many options. They range from the least intrusive, such as requiring routine reports from defendant institutions,[18] to the most intrusive, such as the appointment of receivers who may actually administer defendant organizations.[19]

In choosing a method, a number of factors must be taken into account. Sensitive to the tradition of judicial restraint, federal judges prefer the less intrusive mechanism.[20] However, nonintrusive methods are unlikely to promote significant institutional change. Although it is only one factor in the reform process and does not by itself account for institutional reform, the effectiveness of judicial intervention seems to depend on the vigor and the resources applied by the court to the task. Even when special masters and commissions are established, unless members are given direct access to the organizations and are backed by the determination of a judge to superintend the implementation process, it seems that results fall short of the intent of the court's orders.[21]

Possibly because of the courts' history of limited success in these cases and because of reactions against the alleged activism of the courts, federal judges recently have been increasingly reluctant to become involved in the reform of social institutions.[22] Some judges do continue to look for solutions to the problem of balancing the capacity of the court to institute

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[16] *E.g.*, Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Howard, *Adjudication Considered as a Process of Conflict Resolution*, 18 J. PUB. L. 339 (1969).

[17] For a discussion of the similarities of institutional reform cases and more conventional cases in which courts have maintained their jurisdiction, see Eisenberg & Yeazell, *supra* note 3, at 467-88.

[18] *See* Lottman, *supra* note 6, at 94.

[19] For a discussion of the development of the master and receiver in public law litigation, see Brakel, *Special Master in Institutional Litigation*, 1979 AM. B. FOUND. RESEARCH J. 543.

[20] *See* Special Project, *supra* note 8, at 924-26.

[21] *See* Lottman, *supra* note 6, at 104; Note, *supra* note 8, at 447.

[22] Kirp, *supra* note 5, at 120.

reform of social institutions with the principle that the operation of major public institutions should not result in the maldistribution of social goods to any class of citizens.[23] The PARC case provides an opportunity to examine the effectiveness of a novel method of implementing a court decree initiated by one judge in his attempt to resolve the problems associated with the provision of an "appropriate" public education for retarded people by a major metropolitan school system.

PENNSYLVANIA ASSOCIATION FOR RETARDED CHILDREN V. PENNSYLVANIA[24]

The suit brought by the Pennsylvania Association for Retarded Children against the Commonwealth of Pennsylvania challenged laws that effectively excluded severely retarded children from the public schools.[25] The consent agreement ratified by the court in 1972 established that all mentally retarded children are capable of benefiting from an education.[26] It mandated the provision of free public programs of instruction for all retarded persons ages six through twenty-one appropriate to their learning capacities.[27] It also required individualized evaluations and plans,[28] timely notification of decisions to parents,[29] and due process procedures by disinterested parties in the case of contested school decisions.[30] The decree stipulated that the state submit plans for identifying all previously excluded children and for educational programs including their range, location, funding, and staffing.[31] The orders specified timetables for compliance and provided for appointment of two masters with expertise in the field of special education to oversee the implementation of the decree[32] and to hear members of the plaintiff class "who may be aggrieved by the implementation of this order."[33] Finally, the court retained jurisdiction over the case until it heard the final report of the masters.[34] The decree was the most elaborate statement of the educational rights of retarded children issued to that date and was viewed as a major victory

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[23] The efforts of Judge Edward R. Becker in implementing the PARC decree are examples of such attempts.

[24] Field research on this case was conducted between January 1980 and August 1981. Researchers interviewed school personnel, attorneys for the plaintiffs, and officers and members of advocate groups. In addition, hearings were attended and documents pertaining to the case were reviewed. The information on the hearings was gathered by both attendance and review of the docket, PARC v. Pennsylvania, No. 71-42 (E.D. Pa.).

[25] PARC v. Pennsylvania, 343 F. Supp. 279, 279 (E.D. Pa. 1972).

[26] *Id.* at 307.

[27] *Id.* at 314.

[28] *Id.* at 303.

[29] *Id.* at 308.

[30] *Id.* at 314.

[31] *Id.* at 315.

[32] *Id.* at 314.

[33] *Id.* at 315.

[34] *Id.*

by advocates for handicapped children. Along with other case law, it subsequently became the foundation for federal law with respect to the rights of handicapped children.[35]

Theoretically, the decree should have had a better than average chance of effectively guiding change in Pennsylvania's special education program.[36] It was based on a relatively broad consensus among state officials, educators, and advocates. As evidenced in other court decisions[37] and legislation such as the Education of All Handicapped Children Act,[38] there seemed to be support in the American political community for its provisions. Ostensibly, the State was cooperating. It set up a Right to Education Office to help local school districts comply with state plans for the location and education of the severely retarded and appointed local boards called Local Task Forces to encourage communication between major consumer groups and local officials.[39] Timetables for implementation, which subsequently proved unrealistic, were prescribed.[40] Finally, experienced masters established an oversight system.[41]

Theoretically all of these conditions should have promoted the possibility of orderly remediation; however, the process of educational reform in Pennsylvania, most notably in Philadelphia, moved at a very slow pace. During the first eighteen months the court orders were in force, the plaintiffs repeatedly petitioned the court for enforcement against the Commonwealth and the School District of Philadelphia.[42] Although the court issued subsequent orders[43] to correct deficiencies with which the defendants ostensibly complied, the final masters' report submitted in January 1974

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[35] Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L. Q. 986 (1977), *reprinted in* CHANGING PATTERNS OF LAW (W. Phillips & J. Rosenberg eds. 1980); Oberman, *The Right to Education for the Handicapped*, 5 AMICUS 44 (1980).

[36] The same point is made by Rebell, *Implementation of Court Mandates Concerning Special Education: The Problems and the Potential*, 10 J. L. & EDUC. 335, 339, (1981).

[37] *E.g.*, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972).

[38] 20 U.S.C. §§ 1411-20 (1976 & Supp. IV 1980).

[39] PENNSYLVANIA DEPARTMENTS OF EDUCATION AND PUBLIC WELFARE, COMPILE: COMMONWEALTH PLAN FOR IDENTIFICATION, LOCATION AND EVALUATION OF MENTALLY RETARDED CHILDREN 11 (1972) [hereinafter cited as COMPILE].

[40] PARC v. Pennsylvania, 343 F. Supp. 279, 315 (E.D. Pa. 1972).

[41] *Id.* at 314.

[42] Plaintiff Petition for Order of Reference, and Motion for Enforcement and Sanctions, PARC v. Pennsylvania, No. 71-42 (E.D. Pa. July 21, 1972) (Doc. No. 112); Plaintiff 's Motion for Remedies for Noncompliance, *id.* (E.D. Pa. May 29, 1973) (Doc. No. 135).

[43] On August 3, 1972, the court ordered the school district of Philadelphia to bring itself into compliance with the court order dated May 5, 1972, and to appear and present a plan for identifying and locating excluded children. *Id.* (E.D. Pa. Aug. 3, 1972) (Doc. No. 115). On October 5, 1972, the court ordered the Commonwealth and the Philadelphia Board of Education to meet for the purpose of jointly preparing a plan to provide education and training to all retarded children. *Id.* (E.D. Pa. Oct. 5, 1972) (Doc. No. 115). On June 15, 1973, the court ordered the school district to prepare and implement a plan and amend its budget to provide access, during the summer of 1973, to free public programs of education to retarded children. *Id.* (E.D. Pa. June 14, 1973) (Doc. No. 138).

indicated that while some of the mandated procedural requirements—such as the identification of previously excluded children—had been accomplished and detailed programs had been planned, few substantive improvements had been made in the education provided to retarded children.[44]

Between February 1974, when the case was placed on the calendar of Judge Becker, and October 1976, there was virtually no official action on the case. Consequently in March 1977, plaintiff groups took action again. The Philadelphia Association for Retarded Children (Philarc), claiming noncompliance on the part of the Commonwealth and the Philadelphia School District, went back to court entering a motion for contempt (later dropped),[45] for enforcement of orders, sanctions, and other relief.[46] At the same time, a similar petition including a motion for compensatory damages was entered by Marion and Leona Fialkowski on behalf of their retarded sons.[47] Their petition was joined by Advocates for the Developmentally Disabled and the Police and Fire Association for Handicapped Children,[48] two advocacy groups based in Philadelphia whose members had a special interest in the education of severely retarded children.

Pretrial hearings on these petitions were held in August 1977. During the next fourteen months, Judge Becker attempted to negotiate a settlement among the parties. During these negotiations the list of participants expanded as the judge sought information and made himself available to hear the complaints of parents and other interested parties. The school system appeared to move slowly in complying with the court's orders and the plaintiffs repeatedly complained of insufficient progress. Although they pressed for a new trial, the judge convinced them temporarily to forego adversarial proceedings and to continue to negotiate while participating in public implementation hearings over which he would preside.[49] The informal sessions were to be conducted with all parties to the litigation, plus any other interested persons who might choose to attend, with the proceedings becoming part of the case record. The purpose of the hearings would be to collect more information, to settle disputes, and plan and monitor the efforts of the schools to establish appropriate educational programs.

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[44] Third and Final Report of the Court Appointed Masters, *id.* (E.D. Pa. Jan. 25, 1974) (Doc. No. 143, at 14-15).

[45] Motion for a Finding of Contempt Against the School District of Philadelphia for Enforcement of Orders, Sanctions, and Other Relief, *id.* (E.D. Pa. Mar. 4, 1977) (Doc. No. 152).

[46] *Id.*

[47] Petition of Walter and David Fialkowski for Enforcement of Orders and for Sanctions, *id.* (E.D. Pa. Mar. 17, 1977) (Doc. No. 157).

[48] *Id.* (E.D. Pa. June 7, 1977) (Doc. No. 173).

[49] Interview with Audrey Coccia, former member of the Board of Trustees, Philadelphia Association for Retarded Citizens, one of the founders of Advocates for Developmentally Disabled and Police and Fire Association for Handicapped Children, and Co-chair of the Special Education Action Committee (SEAC), in Philadelphia, Pennsylvania (Apr. 16, 1981).

In effect, Judge Becker was attempting to set up a system that would substitute for further adversarial proceedings. If the parties could reach new agreements, there would be no need for further orders. Based on the history of other cases, further orders would have an uncertain effect. Similarly, if the judge could bring community and judicial pressure to bear on the defendants to put their house in order, it might be unnecessary to impose sanctions for noncompliance. The court rarely has sufficient means available to it for the enforcement of sanctions of this kind. The first public hearing was held in January 1979, six and one-half years after the court's ratification of the original decree. Those plaintiffs representing the most severely retarded tended to view the hearings as a further delay in their efforts to insure the education of the handicapped children in the Philadelphia schools and reluctantly consented to the hearing.[50]

The judge's decision to continue to preside over the negotiations was unusual because federal judges are often reluctant to assume such responsibility in cases of institutional remediation. Aside from the considerations of judicial restraint related to such a step, courts lack the resources to participate in disputes that may take years to resolve, and judges usually are not expert in the institutional matters that come before them. Conventionally in cases similar to the PARC case, judges have chosen to appoint experienced masters or commissions to supervise the execution of their orders. These surrogates not only relieve the judge of the continual burden of supervision, but they also provide a degree of protection against the politicization of judicial decision making, which may compromise the adjudicatory function of the court. Through protracted involvement a judge might develop an empathy with one of the parties or become an advocate for a particular remedy. The result could be the adoption of a political perspective that might endanger the distinction between a judge's personal beliefs and an appropriate equitable remedy. Theoretically, adjudicatory legitimacy depends on this distinction.[51]

In reality, the adjudicatory and political components of the judicial role are inseparable in cases involving the redistribution of resources in major institutions. Nonetheless, an obvious exaggeration of their overlap could call into question the impartiality of subsequent orders. Consequently, by making a commitment to continue his role in the negotiations, Judge Becker was taking a considerable risk. The move to a public forum significantly heightened the risk of losing impartiality in the judicial process by altering the nature of negotiations. School administrators who normally plan and execute their policies under cover of bureaucratic invisibility had no choice but to expose some of their operations and the influence of special interests within the bureaucracy to public scrutiny.

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[50] *Id.*

[51] Diver, *supra* note 16, at 104.

Although the plaintiff groups had seemed united in their efforts to protect the rights of all children to a public education, differences in their positions were revealed. Inevitably, each group tried to impress the court and the public with justifications for its positions and actions. The politics of the implementation process became a matter of public record and the judge had to be continually on guard against becoming publicly identified with the interests of any of the litigants.

By taking risks, Judge Becker theoretically added a new ingredient to the usual process of implementation—that of a continuing judicial presence. For several years he acted as his own master, an ombudsman, and at times as the missing link, administering and coordinating the efforts of groups involved in changing educational programs.

For more than two years prior to the termination of hearings in May 1981, the parties routinely conducted their negotiations to implement the PARC decree in open court. This article will briefly describe the organizaton of these unusual proceedings and address two major questions: first, did the hearings bring the litigants closer to an agreement concerning the operational design for an "adequate" educational program for mentally retarded students?[52] And second, to what extent were these open court hearings an effective device for implementing and monitoring the reform mandated by the PARC decree of special education in the Philadelphia School District?

THE IMPLEMENTATION HEARINGS AS A MEANS OF INSTITUTIONALIZING CONFLICT

In other areas of law involving the execution of judicial orders, there are mature subjudicial institutions that oversee the proceedings.[53] This was not the case here. In the absence of clear guidelines, several issues had to be handled simultaneously before any substantive matters could be addressed. The parameters of the judge's role had to be established. Rules pertaining to participation, procedure, and the use of information presented to the court had to be determined. In short, institutional arrangements had to be made that would protect the rights of the parties while promoting their cooperative efforts. The final form of these

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[52] The Petition of the Philadelphia Association for Retarded Citizens, Petition for a Finding of Contempt Against the School District of Philadelphia, PARC v. Pennsylvania, No. 71-42, (E.D. Pa. Mar. 4, 1977) (Doc. No. 152), and the Petition of Fialkowski, *id.* (E.D. Pa. Mar. 17, 1977) (Doc. No. 157), and later the Petitions of Fialkowski and the Philadelphia Police and Fire Association for Handicapped Children, Memorandum in Support, *id.* (E.D. Pa. Nov. 15, 1979) (Doc. No. 239), stressed dereliction in the planning and implementation of an adequate education. During the pretrial hearings in August 1977, expert testimony was primarily addressed to matters bearing on the definition, implementation, and quality of an adequate education. *Id.* (E.D. Pa. Aug. 15, 1977) (Doc. Nos. 199-201); *id.* (E.D. Pa. Oct. 3, 1977) (Doc. Nos. 205-206, 208-209).

[53] Eisenberg & Yeazell, *supra* note 3, at 315.

arrangements would affect the quality and the quantity of agreements concerning remedial actions. What proceeded was a time-consuming and delicate process of institution building from which any of the litigants might have withdrawn, since they were participating voluntarily, had their interests not been taken into account or their rights not protected by procedural safeguards. The withdrawal of any litigant might have required the judge to schedule the matter for trial, a step which he evidently considered premature and was reluctant to take.

Participation: Formal and Informal Roles

In educational reform of the magnitude involved in the PARC case, there are always nonparty players, such as community and professional groups, which have a stake in the outcome of the litigation, but no formal standing in the courtroom.[54] Although the interests of such groups might represent constraints on the ability of an organization to plan remedial programs or otherwise comply with court orders,[55] their interests are rarely taken into account in the policy process.[56] Several studies support the proposition that because the agreement of persons in the delivery systems of bureaucracies are requisite to successful policy implementation, failure to include them in the policy process decreases the probability of effective organizational change.[57] After four years of involvement, Judge Becker understood the important role such groups play in the change process and created formal arrangements to insure their representation in the deliberations.

In November 1978, prior to the first public hearing, he issued an order creating the Special Education Action Committee (SEAC) to function as an ombudsman, to serve as a link between the community and the schools, to hear, document, and report complaints to the court, and to be a model for a permanent advisory committee. SEAC was composed of representatives of the plaintiff class, the Commonwealth of Pennsylvania, and the School District of Philadelphia. The following were also given seats on the committee: a representative of the Philadelphia Chapter of the Pennsylvania Federation of Teachers, whose petition to enter the case as a neutral party had been granted in 1977;[58] a member of the Philadelphia Association of School Administrators (PASA), which is a professional

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[54] Diver, *supra* note 16, at 75-76.

[55] *See* J. HANDLER, *supra* note 6; D. HOROWITZ, *supra* note 6. Both provide full accounts of structural and political factors associated with the avoidance and transformation of court ordered remediation policies in defendant organizations.

[56] *E.g.*, Weatherly & Lipsky, *Street Level Bureaucrats and Institutional Innovation: Implementing Special Education Reform*, 47 HARV. EDUC. REV. 171 (1977).

[57] *E.g.*, J. PRESSMAN & A. WILDAVSKY, IMPLEMENTATION 94-110 (1973); Elmore, *Organizational Models of Social Program Implementation*, 26 PUB. POL. 215 (1978); Weatherly & Lipsky, *supra* note 56.

[58] Order granting motion of Philadelphia Federation of Teachers to intervene. PARC v. Pennsylvania, No. 71-42, (E.D. Pa. Aug. 11, 1977) (Doc. No. 198).

association and semiofficial bargaining agent for principals and other line administrators in the school district; representatives of community groups with well-established interests in special education reform; a member of the black community; and a member of the Philadelphia Local Task Force. The latter was the local committee composed of educational professionals and citizens created under the Pennsylvania Plan to identify and enroll children previously excluded from the public schools.[59] Even though the Philadelphia Local Task Force had a long history of conflict with school officials and considered the creation of SEAC a threat to its authority, they nonetheless joined the committee. SEAC was co-chaired by a representative of the plaintiffs and by a representative of the defendant school district.

Given the diversity of interests represented at the hearings, it was inevitable that the negotiations would be complex, time consuming, and subject to political maneuvering by the parties. Resolution of issues requiring sharing of authority or redistribution of function, or a compromise of divergent interests, could be limited by the multiple perspectives formally represented. Nevertheless, once SEAC established routines for operation acceptable to its members, it functioned to reduce the scope, if not the intensity, of conflict between the schools and the plaintiffs and, for a time, to contain the disputes within the framework of the hearings.

In addition to providing for broad representation by creating these quasi-official roles, the judge provided for less formal public participation by other persons. A part of each session was set aside to hear the complaints and opinions of parents. Following the airing of complaints, the judge often asked school officials present in the courtroom to meet with parents immediately. The procedure served several important functions. First, it provided a public forum in which individual needs could be publicly expressed. This made information available to the court and sensitized the participants to the human problems involved in the continued bureaucratic delay. Second, because the complaints were heard publicly, school officials had to address certain individual problems even before systematic school reforms could be accomplished. And third, because parents were able to talk directly to high-level school officials whom they perceived to be otherwise inaccessible, the sessions acted as a safety valve. If individual parents had been consistently ignored and denied access to the proceedings, new court actions might have been initiated, bringing additional pressure on the court to abandon its efforts to reach a negotiated settlement.

Establishing Rules of Procedure

Before the hearings could begin, it was necessary to reach an agree-

[59] COMPILE, *supra* note 39.

ment on the rules of procedure to protect the rights and the interests of the litigants. Two types of rules were of critical importance: those governing the use of information and those specifying the functions of the judge and other participants. As to the former, defendants' attorneys were concerned with the kinds of information being presented to the court and the use of such information in future litigation. The issue arose because transcripts of the hearings were to become a part of the court record. However, strict adherence to the rule of evidence and the traditional scope of cross-examination of witnesses would have been inappropriate given the purpose of the implementation hearings. To guarantee that the right to exclude testimony on the basis of hearsay or lack of relevance would not be compromised, the judge and the parties agreed that the transcripts would be inadmissible as evidence in any ensuing contempt or enforcement proceeding.[60]

Just as the rights of the parties might have been injured in future litigation without this guarantee, their rights might have been abridged by the uncontrolled expansion of judicial power. Although there was virtually no overt resistance from the litigants to the judge's performance of some administrative tasks, they blocked his efforts to transfer power to other participants. For example, when Judge Becker suggested that SEAC assume the responsibility for monitoring school programs, a function generally understood by the parties to be reserved to the judge and the Commonwealth through the Local Task Force, lawyers for both sides objected. It may be that the plaintiffs were concerned that this would put school officials who were members of SEAC in the position of monitoring their own programs, thereby diminishing the possibility of an objective evaluation. On the other hand, defendants could have been wary of giving the plaintiff members of SEAC the opportunity for direct entry to school facilities. Jointly, the lawyers argued that the order creating SEAC and describing its functions did not assign a monitoring role to that committee. It was their view that Judge Becker's attempt to assign that function to SEAC was, in effect, an abrogation of an agreement by the parties.[61] This episode and others of a similar nature put the judge on notice that he could not arbitrarily change the rules governing the hearings.

While the attorneys were successful in limiting the powers reserved to the judge, he, in turn, tried to make certain that no party would dominate the proceedings. The PARC decree had given a degree of power to the representatives of the handicapped by mandating institutional remedies and by guaranteeing them continued access to the court. Parents and advocate groups, however, were clearly less powerful and had fewer

[60] Transcript of Implementation Hearing, PARC v. Pennsylvania, No. 71-42, (E.D. Pa. Nov. 1, 1979) (Doc. No. 237, at 68-69).

[61] Transcript of Implementation Hearing, *id.* (E.D. Pa. Jan. 2, 1979) (Doc. No. 213, at 68-73).

resources than school administrators, who were still in control of the daily operation of the schools. Thus, it was necessary that the roles of participants be structured with a view to correcting the imbalance and equalizing their positions. Therefore, when representatives of the advocate groups complained to the judge that the school district's representatives on SEAC were attempting to control the committee by releasing publicity that the plaintiffs felt was misleading and by editing reports sent to the court, he directed that the operating and reporting procedures to which the advocates objected be suspended.[62]

Judge Becker carefully orchestrated the courtroom proceedings. At times he protected school officials from charges of dissembling and evasion. However, when they openly failed to comply with his directives or when promised remedial action was excessively delayed, he threatened to cancel the hearings and schedule the case for trial. Using a variety of tactics including an appeal to reason, threat, persuasion, and direct instruction, the judge negotiated with the parties to produce a set of rules that would protect their rights, balance their powers, and maintain a level of discourse that would not disrupt the working relationship necessary for the continuation of cooperative planning and negotiations.

Setting the Agenda: Defining the Issues

One way to understand what was accomplished during the hearings is to examine the agenda. Setting an agenda is an important element in institutionalizing conflict. It not only reflects the nature of the issues that will be discussed and acted upon, and the plans that are likely to be made, but also determines whose interests will be served in a set of negotiations. Agendas have political implications.[63]

Although thirty-five distinct issues were raised at the hearings, only seven were the subject of substantial discussion. These issues, in order of frequency of appearance and duration of discussion, are: first, the transportation system that takes handicapped children to and from school; second, the role and responsibility of the Commonwealth of Pennsylvania's Department of Education in implementing the PARC decree; third, the telephone "Hotline" maintained by SEAC as a clearinghouse for parents' and school personnel's complaints and questions regarding the school district's special education programs and facilities; fourth, the role and functions of SEAC, especially in relation to the functions of the Local Task Force and also in relation to the school district's special education department; fifth, sensitivity training programs aimed at preparing principals, teachers, and nonhandicapped students for the introduction of handi-

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[62] *Id.* at 1-10.

[63] *E.g.*, Diver, *supra* note 16, at 83-84.

capped students into the schools; sixth, "needs" surveys aimed at determining parents' and school personnel's perceptions of the extent and kinds of programs required in the schools; and seventh, the school district's curriculum plans, especially the "life skills" program. The curriculum plans were rarely discussed or debated. They were simply presented by school district officials, but were occasionally attacked as paper plans with no practical effect.

These issues fall into two distinguishable, though not absolutely separable, categories. The first consists of issues concerned with the logistics involved in introducing retarded children into the schools. The second involves issues concerning the distribution of power related to monitoring and shaping school policy.

Issues in the first category are concerned primarily with procedural matters rather than with the curriculum and staffing of educational programs. Because resolution of such problems requires change in organizational procedures, but few normative agreements concerning staff functions and responsibilities or the substance of educational programs, and because they have relatively little to do with the rights and prerogatives of the parties involved, they tend to be amenable to solution. Further, their progress can be measured in quantitative terms. Even adversaries are more likely to agree about the success or failure of a given procedure.[64]

In contrast, issues of the second type involve questions concerning the distribution of authority, the permeability of institutional boundaries, and the distribution of duties relative to school reform. These issues were not as easily resolved and were the subjects of protracted debate. These debates were of two types: one involved the responsibilities of each of the defendants and the other the distribution of authority among the parties—especially regarding the relative roles of SEAC and the Local Task Force.

As an example, unresolved conflict existed between the judge and the Pennsylvania Department of Education regarding the extent to which the State was to be responsible for monitoring the programs of local school districts. The State Secretary of Education has not been as vigorous in his support of special educational programming as was his predecessor, who was a party to the negotiations that resulted in the original PARC decree. In fact, the current secretary has lobbied in Washington to limit the scope of such programs and recently proposed new reduced funding formulas that would allow local districts greater discretion to allocate special education funds.[65] The secretary defined the State's role primarily

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[64] The relative ease with which procedural or administrative issues can be resolved in contrast to substantive issues has been widely remarked, and is illustrated in case materials. *See* J. HANDLER, *supra* note 6, at 166-67; D. HOROWITZ, *supra* note 6, at 106-70. Improvement in administrative procedures rarely affords a consensus of opinion as to the achievement of qualitative improvement in the delivery of services or treatment.

[65] PENNSYLVANIA DEPARTMENT OF EDUCATION, PROPOSED TWO YEAR PLAN FOR SPECIAL EDUCATION 1-5 (1981).

as that of a resource and information center and insisted that there was insufficient support in the legislature to justify the expansion of the State's function. Judge Becker took the position that the decree required the involvement of the State in monitoring and coordinating programs in local school districts.[66] The views of the court and the Commonwealth were apparently irreconcilable. The State, despite the court's orders, has insisted on its position and the court had no readily available means to compel the Pennsylvania Department of Education to change its policy. Under these circumstances, even a contempt citation would have had little impact.

While there was agreement among State and city officials concerning the State's nonintrusive policy, State and city officials have been engaged in a battle over the alleged failure of the State Department of Education to meet its financial commitment for special education in Philadelphia. The Philadelphia School District is currently suing the department; in the original suit, the school district claimed that the department defaulted on its obligation to pay $34 million to the district for special education programs. Without these funds the city argues that it cannot meet the requirements prescribed in the decree and related legislation. The issues of funding and interorganizational conflict that are rooted in the broader political controversy concerning the control of the schools often cannot be resolved in the courtroom. Nevertheless, these issues affect the process of organizational reform over which the court has jurisdiction.

In addition to the controversies involved in intergovernmental relations, the debate continued among members of SEAC. Their differences seemed to center on several issues. First, as noted by Diver in suits such as this, there is often competition among the advocacy groups over who will represent the plaintiff class in the negotiations.[67] Philarc is an established organization with a strong position in the community. Advocates for the Developmentally Disabled and the Police and Fire Association for Handicapped Children are less established groups that generally represent the more severely retarded, a somewhat different and narrower constituency with special concerns relative to institutional reform. Adding to the difficulties in reaching an agreement, the Local Task Force argued that SEAC had usurped its functions.

Second, in addition to the political conflict among the advocates, intracommittee relations were complicated by the protective strategies of school officials concerned with the encroachment of nonexpert citizen groups on professional territory. School officials guarded against the intrusion of citizen groups and monitoring by outside experts hired by the plaintiffs, who were viewed as agents of the opposition rather than

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[66] Transcript of Implementation Hearing, PARC v. Pennsylvania, No. 71-42, (E.D. Pa. June 13, 1979) (Doc. No. 220, at 54, 56-59); *id.* (E.D. Pa. Nov. 1, 1979) (Doc No. 237, at 73, 95-96).

[67] *See generally* Diver, *supra* note 16.

disinterested evaluators. In fact, the officials resisted all routine monitoring of the system.

These controversies concerning representation and authority were ongoing and unavoidable. They could not be easily resolved unless principles defining the rights and duties of the parties had been clearly spelled out in law and institutionalized in practice. Even then the nature of these controversies precluded stable resolutions. The issues had to be settled relative to each policy decision. This is an aspect of the political process accompanying organizational reform that occupied both the attention and the time of the parties during negotiation and resulted in delay of decree implementation.

If procedural and political issues remained the focus of negotiation throughout the hearings, what was not considered? Agendas are important not only because of what they include, but also because of what they exclude. Topics not routinely considered included the appropriateness of individualized educational plans, classroom placements, the quality of programs, and the obligation of the school district to provide educationally related services such as physical and occupational therapy. These were core issues relating to the quality and the breadth of educational programs to be provided to meet the "appropriate education" stipulation of the decree.[68] Early in the hearings it became apparent that the district did not have orderly procedures for transporting and evaluating mentally retarded students or for training teachers and staff to provide suitable instruction. In a statement delivered at the second public hearing, the judge instructed school administrators to give priority to improving the system in these areas.[69] It was his view that without resolving these critical procedural problems, the schools would be unable to accommodate retarded students.[70]

Because technical and procedural problems were high on the list of issues to be addressed, and because Judge Becker asserted that the resolution of individual problems was contingent on positive developments in these areas, questions of the quality of education were temporarily deferred. Inevitably, such issues did arise because they were of major concern to the plaintiffs. When they were discussed, the degree of disagreement among the parties concerning the quality of programs in place, and their inability to agree on standards by which to judge the adequacy of these programs, generated unresolved debate.

In sum, conflict between the parties was controlled by structuring an agenda that focused on either procedural issues that lent themselves to measurable progress because there were fewer disagreements or

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[68] PARC v. Pennsylvania, 343 F. Supp. 279, 285, 288, 302, 307 (E.D. Pa. 1972).
[69] PARC v. Pennsylvania, No. 71-42, (E.D. Pa. Nov. 1, 1979) (Doc. No. 237, at 55-58).
[70] *Id.*

generalized and unavoidable debates concerning the proper degree of authority and responsibility of the parties. Issues concerning the quality or evaluation of educational programs available to retarded students in the Philadelphia schools were avoided as long as possible.

Negotiations: Conflict Resolution and Oversight

The implementation hearings ended in June 1981. Progress has been made on logistical issues concerned with the preparation of the school system for the inclusion of handicapped children. Despite flaws, the bus system now operates in a reasonable way, the Hotline has led to the resolution of many parents' complaints, sensitivity programs have been established, retarded children have been identified and placed in classrooms, and, in most cases, individual educational plans have been written, albeit not without certain difficulties.[71] The hearings resulted in a narrowing of the scope of conflict as these procedural problems were resolved. Further, the intensity of the conflict was somewhat diminished as routines were established for dispute resolution. The hearings, however, were not an effective means of resolving many of the core issues. Resolution of these issues would have required a fundamental shift in the conflicting perspectives of the parties. This shift has not occurred because, to a large extent, these conflicting perspectives are inherent in the differing positions of the parties to the case.

School officials view themselves as experts and professionals with the training and authority to determine eduational policy. Parents and others representing retarded children see themselves as naturally qualified to know what is best for their children. These differing views, based on distinct roles with competing claims to authority, cannot be easily compromised.

School officials, by definition, are concerned with devising and delivering classes of services to categories of children. Their orientation is universalistic and general. Parents, on the other hand, are concerned with the particular needs of their children regardless of whether the system is able to meet those needs in any precise way and still provide an adequate education for thousands of others.

School district officials, almost of necessity, operate within a complex bureaucratic context with widely dispersed and interconnected centers of power. Significant changes in services such as the ones involved in

[71] The types of reform accomplished during the period of the hearings are similar to those initiated early in the remedial process. Final Masters Report, *id.* (E.D. Pa. Jan. 25, 1974) (Doc. No. 143, at 14-15). In an evaluation of reform processes in special education, Kirp, Buss, and Kuriloff find that administrative procedures unlikely to require reshaping of educational programs will be put into effect with relatively little resistance. Kirp, Buss & Kuriloff, *Legal Reform of Special Education*, 62 CAL. L. REV. 40 (1974), *reprinted in* CHANGING PATTERNS OF LAW (W. Phillips & J. Rosenberg eds. 1980).

this case cannot be accomplished without disruptive reverberations within the system. Change is, therefore, likely to be slow, problematic, and difficult to achieve. From the perspective of parent and other groups, school district programs will frequently appear to be halfhearted at best and intentionally evasive at worst.

Finally, parents can afford to think about ideal educational programs unconstrained by budgetary and other external considerations. School officials, especially in the present case, must develop programs within a restricted monetary environment aggravated by demands of competing groups within the educational system and within a political environment in which the claims of the handicapped may be viewed with indifference and, sometimes, hostility. Each point of view was represented on SEAC. Added to these differences in the perspectives of the litigants were those of other groups such as the Philadelphia Chapters of the American Federation of Teachers and the Pennsylvania Association of School Administrators. The representatives of these groups were unwilling to consider changes perceived to be antithetical to their interests or to allow their prerogatives to become the subject of negotiation. The judge legitimated their interests by providing the teachers' union and the association of school administrators with formal roles in the proceedings from which those interests could be articulated and defended.[72] Consequently, the agenda consisted of a relatively narrow range of topics on which progress appeared possible. Arguments over political domain continued to influence even seemingly routine procedures initiated by SEAC.

It has been suggested that one of the significant problems in the policy implementation process is that officials charged with the translation of policy into practice are rarely consulted at the design stage. Theoretically, then, the inclusion of those who are to implement policy in the planning process should result in policies that are more likely to be successfully

[72] In the motion filed by the Pennsylvania Federation of Teachers to Intervene, PARC v. Pennsylvania, No. 71-42, (E.D. Pa. Apr. 2, 1977) (Doc. No. 164), the petitioners argued that their members had responsibility for aspects of decree implementation; that their activities relative to professional responsibilities were subjects of contractual agreement; that should the specification of the motions of plaintiffs be granted, the board of education and the school district would be displaced as the agency responsible for the provision of special educational services; that the appointment of special masters would disturb the distribution of responsibilities existing in the organization; and that the appointment would create a clear and potential conflict with collective bargaining agreements in effect. They cited conflict in procedures for evaluating children as mandated and as agreed upon in their contracts. In granting the motion, Judge Becker acknowledged that contracts between the union and the Philadelphia School District involved mandated activities and that the court has an interest in the impact of remedial orders on contractual relations. The court agreed that neutral intervention was appropriate because neither the plaintiffs nor the defendants could adequately represent the union's interest. Bench Opinion, *id.* (E.D. Pa. Aug. 5, 1977) (Doc. No. 203).

operationalized.[73] In fact, in the reform of special education, research suggests that grass roots participation in planning is related to effective program change.[74] On the other hand, it also appears that when bureaucratic personnel participate directly in the design of change, the constraints normally associated with bureaucratic resistance to innovation may intrude upon and become part of that design.[75] To a significant extent, this occurred during the PARC hearings. As the hearings progressed, it seemed that negotiations tended to focus on what the participants believed were possible changes, with "possible" defined by the political and organizational constraints imposed by the more powerful participants. Possibilities, not rights and duties, which are the focus of judicial concern, took precedence and affected both the substance of agreements and the rate and nature of organizational adaptation. To the extent that groups associated with school bureaucracy and with the Commonwealth were sufficiently powerful to limit or to foreclose policy options, to shape the agenda of the hearings, and to seek coalitions with others of similar mind on particular issues, the negotiations resembled a legislative process rather than a conference of equals whose mission was to find ways to comply with the court decree.

As some members of the plaintiff class were quick to realize, for those of lesser power, negotiations are not a reasonable substitute for adjudication. To be effective in a quasi-legislative process, each party should have roughly the same degree of power. Each must control real or symbolic resources needed by others in order to effect compromise. Though the PARC decree and federal law affirmed the plaintiffs' rights to an appropriate education, they had insufficient power to force school and Commonwealth officials to consider seriously many of the issues they thought were critical to the implementation of the decree without further judicial orders. In addition, plaintiff groups dependent upon volunteers could not match the resources of the school, whose professional staff reported to the court. The plaintiffs had limited personnel to review

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[73] Berman, *The Study of Macro and Micro Implementation*, 26 PUB. POL. 160 (1978); Van Meter & Van Horn, *The Policy Implementation Process: A Conceptual Framework*, 6 AD. & SOC. 445 (1975); Weatherly & Lipsky, *supra* note 56, at 171-97.

[74] Upon reviewing the literature identifying factors facilitating policy implementation, Elmore concludes:

> The only implementation that makes sense under these conditions is one that emphasizes consensus building and accommodation between policy makers and implementors. . . . Policy does not exist in any concrete sense until implementors have shaped it and claimed it for their own: the result is consensus reflecting the initial intent of policy makers and the independent judgment of implementors.

Elmore, *supra* note 57, at 216.

[75] For discussions of the effects of multiple participants and perspectives on the policy process, see E. BARDACH, THE IMPLEMENTATION GAME 56 (1977); J. PRESSMAN & A. WILDAVSKY, *supra* note 57, at 94.

and validate records. Although the Philadelphia chapter of PARC made personnel and facilities available and although the volunteers from the other advocacy groups involved were sufficiently sophisticated to challenge the school administrators when their reports were obviously biased, the prolongation of the hearings strained the collective resources of the plaintiffs. Further, though the plaintiffs could challenge the schools through court action and make public their dissatisfaction with the performance of the Philadelphia School District, as individuals, having no options for alternative education for their children, they remained dependent on their adversaries. This dependency made their position inherently weak.[76]

Originally, the hearings were to have a dual purpose: to provide a mechanism for reaching new agreements among the parties and to provide a means of monitoring the progress of the school district in its efforts to comply with the decree. As a monitoring device, the hearings were no more effective than the masters' hearings had been. The judge was able to supervise the implementation of some detailed procedures such as the development of a reasonably efficient transportation system for retarded children and the routines for bringing the complaints of parents to the attention of school personnel in a systematic way. However, an effective technique for evaluating the quality of the programs was never established. From the start of hearings, the plaintiffs insisted that the judge retain the authority to monitor the schools.[77] The judge was carrying a full caseload and had made no provision for surrogates to have direct access to school sites. His schedule permitted only one visit to selected schools during the two years of hearings. Aside from unverified information presented directly by school administrators to the court and the reports of SEAC, which were often challenged on the basis of bias,[78] the court had no arrangements for the routine collection of information by disinterested parties. The plaintiffs did not have the resources to collect information independently, nor were they provided with regular access to classrooms for monitoring purposes. The Commonwealth, despite the urging of the court, consistently refused to monitor district schools directly[79] and the Local Task Force, which unofficially had performed monitoring functions prior to the creation of SEAC, was virtually inactive in this respect during the period covered by the hearings.

The Development of Different Strategies Among the Plaintiffs

In addition to the structure of the proceedings, other factors affected

[76] For the effect of dependency relations on court mandated institutional remediation, see Eisenberg & Yeazell, *supra* note 3, at 511-12.

[77] Transcript of Implementation Hearing, PARC v. Pennsylvania, No. 71-42 (E.D. Pa. Jan. 2, 1979) (Doc. No. 213, at 68-73).

[78] *See, e.g., id.* at 6-9.

[79] *Id.* (E.D. Pa. Feb. 6, 1979) (Doc. No. 217, at 61-65); *id.* (E.D. Pa. Mar. 23, 1979) (Doc. No. 218, at 75-80); *id.* (E.D. Pa. June 15, 1979) (Doc. No. 220, at 75-76).

the outcome. These negotiations lasted in one form or another for more than three years, in contrast to most litigation, which is of shorter duration. Consequently, unpredictable developments were more likely to affect the negotiations. Two such developments were particularly important. First, the decline in fiscal support for programs for the handicapped by the State[80] provided a credible excuse for the inability of officials to fulfill their obligatons under the decree and fueled arguments against the expansion of supportive services to the mentally retarded.[81] Second, during the course of the proceedings, Philarc, the largest and best established of the plaintiff groups, began to change its strategies. For several years, its professional leadership had been giving top priority to devising systemwide procedures that would facilitate the incorporation of all mentally retarded children into the schools and to delivering of a broad range of services to the community rather than concentrating on advocacy and litigation.[82] Having assigned priorities to these services, the Philarc leaders believed it to be in their interest to work cooperatively through SEAC and in direct consultation with school administrators to streamline the transportation system, to routinize complaint procedures, and to educate the parents of mentally retarded children. Eventually, Philarc developed contractual relations with the Philadelphia schools, working as consultants on the design of several of these programs. At the same time, in separate sessions, Philarc's lawyers worked to achieve an agreement with the schools concerning curricula and programs for educable and trainable mentally retarded students.

The professional leadership of Philarc viewed school reform as a difficult, incremental process and, given the political and fiscal realities, they had reason to believe that a cooperative approach would have positive results.[83] Through litigation they had achieved success in getting retarded children into the schools. To a limited extent, they influenced programs, established relationships with school administrators, and developed both direct and informal access to the system. Although they continued to challenge the efficacy of specific programs, they were, nevertheless, satisfied that some problems were being resolved in a way that would eventually provide a better, if not ideal, education for the majority of retarded children.

From the point of view of the school district, the relatively conciliatory position taken by Philarc was an asset for several reasons. Philarc had

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[80] *See* note 65 & accompanying text, *supra*.

[81] For differing views among the parties concerning the relationship of funding and implementation of PARC, see PARC v. Pennsylvania, No. 71-42, (E.D. Pa. June 13, 1979) (Doc. No. 220, at 56-58). The defendants argue that the expansion and full range of offerings mandated are not possible given the shrinkage of funds, while the plaintiffs counter that in the long run the delivery of services will be economical and that reform is blocked for noneconomic reasons. *Id.*

[82] Interview with Erman-Anthony Gentile, Executive Director, Philadelphia Association for Retarded Citizens, in Philadelphia, Pennsylvania (Apr. 14, 1981).

[83] Interview with Caryl Oberman of the Education Law Center, in Philadelphia, Pennsylvania (Apr. 21, 1981).

experience and personnel who could assist the district with special tasks. By contracting with them for programs such as sensitivity training for parents and methods for resolving organizational problems, the district got the benefit of their expertise, and, at the same time, was able to demonstrate to the court and the public its willingness to cooperate with former adversaries. As a result, in addition to assistance with the development of important programs that were not involved with the direct education of the children, but with peripheral matters, cooperation with the advocacy group had a symbolic payoff.

Other members of the plaintiff class, including the Fialkowskis, the Advocates for the Developmentally Disabled, and the Police and Fire Association for Handicapped Children, were following a different course. About one year after the initiation of the implementation hearings, these groups, which generally represented the most severely impaired children, convinced that the negotiations would not result in significant reform, withdrew their members from SEAC. They insisted that the judge consider their petition requesting enforcement and further orders to specify the responsibilities of both the Commonwealth and the Philadelphia schools and to establish standards for evaluating the system. Philarc did not join in this action. However, acknowledging the rights of the other plaintiffs, Judge Becker finally dissolved SEAC and ended the implementation hearings as of June 8, 1981, the date the trial began. Although the petitioners presented their case, the cases of the school district and of the Pennsylvania Department of Education were never presented. The parties entered into lengthy negotiations which resulted in a settlement agreement of all individual and class claims on May 14, 1982.[84]

The split within the ranks of the plaintiffs regarding legal and political strategy is likely to affect the implementation of the new agreement between a subclass of the plaintiffs and the defendants. At present a major and relatively powerful adversary is temporarily willing to accede to a slow pace of change. This relaxation of pressure may influence the process of implementing the new stipulations. The order is complex and likely to be costly, yet compliance will be of most immediate relevance to the smaller and poorer community groups that speak for the least prepossessing members of the original class. Disadvantaged groups such as these, whose constituency has only tenuous public support and whose legitimate claims are only reluctantly acknowledged by the community, are extraordinarily dependent on the courts for the vindication of their rights,[85] yet the courts' ability to secure these rights is limited.

CONCLUSION: THE COURTS AND INSTITUTIONAL CHANGE

As to the effectiveness of the hearings, evaluations differ. The outcome

[84] PARC v. Pennsylvania, No. 71-42, (E.D. Pa. May 14, 1982) (Doc. No. 312, at 3).
[85] *See generally* Diver, *supra* note 16, at 67-70.

of negotiation is generally judged from the perspective of each party.[86] From the point of view of Philarc the hearings are viewed as having been moderately successful.[87] The organization has used the hearings to develop working relationships with school officials with whom it now shares, to some extent, a common expectation regarding the reform process. As Philarc sees it, continued negotiations with the schools, rather than litigation, will be of greater advantage to retarded children.[88] School officials, though often pressured by the court, used the hearings and court directives as leverage with their superiors in the school district to demand action on the improvement of special education.[89] Further, they were able to avoid litigation for several years and so have gained time for the school district to implement some of the administrative procedures mandated in the decree. Objectively, it is not possible to judge whether these procedures would have been developed in the absence of the hearings.[90]

From the point of view of those plaintiff groups that went back to court, the hearings are considered unsuccessful. In their view, throughout the negotiations school officials were able to avoid making critical decisions related to the content and the quality of educational programs for retarded students. Consequently, some of the advocates viewed the lengthy negotiations as a means of delaying the remediation process and as a subversion of their clients' rights.[91] As early as May 1980, a year before he ended the hearings, the judge, too, wondered whether the process was inadvertently working to the disadvantage of individual plaintiffs.[92]

As with other modes of court intervention, neither prolonged negotiation with direct judicial involvement nor the pressures created by public scrutiny have been sufficient to resolve, to the satisfaction of the parties, the complex issues involved with the substantive reform of special education in the Philadelphia School District.

Philarc continues to negotiate with the school district to reach accord on substantive issues involved in the education of educable and trainable mentally retarded students. As indicated earlier, the suit of the Fialkowskis, the Advocates for the Developmentally Disabled, and the Police and Fire Association, which represent most severely retarded children, has been settled.[93] This settlement agreement includes detailed stipulations for development of curricula and their introduction into all

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[86] Elmore, *supra* note 57, at 218.

[87] Interview with James C. Everett, Attorney for the Philadelphia Association for Retarded Citizens, in Philadelphia, Pennsylvania (June 2, 1981).

[88] *Id.*

[89] Interview with an Administrator in the Department of Special Education, School District of Philadelphia, in Philadelphia, Pennsylvania (July 8, 1980).

[90] Rebell reports that under the supervision of a special master, New York City has made significant improvements in procedures related to special education programs. Rebell, *supra* note 36, at 352.

[91] Interview with Audrey Coccia, *supra* note 49.

[92] PARC v. Pennsylvania, No. 71-42, (E.D. Pa. May 2, 1980) (Doc. No. 262, at 58).

[93] *Id.* (E.D. Pa. May 14, 1982) (Doc. No. 312).

schools, provision of support services, institutionalization of inservice training for school personnel, evaluation procedures, internal coordination of programs, systematic monitoring by the Local Task Force, parent training, creation of a professional advisory group, and designated deadlines for implementation and the delivery of plans and progress reports to the court.[94] In addition, specific budget commitments have been agreed to by the state,[95] and the court has retained jurisdiction over the case for the purpose of enforcement for three years from the date of the court's approval of the agreement.[96] As the judge anticipated, an agreement which might effectively redress the grievances of the plaintiffs would, of necessity, have to be comprehensive.[97] New provisions have been made for internal administrative coordination, the appointment of a project administrator to supervise all developments, and the assignment of programmatic and procedural responsibilities to designated school personnel.[98] It is possible, given the explicit detail in the new agreement and the apparent willingness of the defendants to agree to a broad range of program and organizational change, that the new plans will be expeditiously formulated and implemented. This can only be determined in the future.

At present, as a result of the settlement and continuing negotiations between Philarc and the defendants, the court is less involved in the implementation process than it has been during the past five years. However, given the far reaching reforms called for in the new agreement and the fact that reasonable people may disagree with the definition of terms such as "state of the art and all necessary teaching-learning resources and coordination for the free appropriate education of severely handicapped students,"[99] the parties may have to appeal to the court for further clarification in the future. If they do, the court will have to determine whether the plaintiff class should seek relief through repeated court action, whether to urge the reinstitutionalization of hearings, whether to appoint masters or other surrogates to administer the settlement, or whether to take even more forceful steps. Tradition suggests that it is unlikely that an extremely intrusive mode of oversight would be chosen. Yet given the relative weakness of the plaintiff class as presently constituted, a less intrusive means of supervising implementation may not be notably successful.[100] As willing as Judge Becker has been to participate in the reform of the Philadelphia public schools to insure the rights of handicapped children, public hearings, lengthy negotiations and the

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[94] *Id.* at 5-20.
[95] *Id.* at 19-20.
[96] *Id.* at 22.
[97] *Id.* (E.D. Pa. June 13, 1979) (Doc. No. 220, at 87-92); *id.* (E.D. Pa. Nov. 1, 1979) (Doc. No. 237, at 63).
[98] *Id.* (E.D. Pa. May 14, 1982) (Doc. No. 312, at 7-22).
[99] *Id.* at 5.
[100] *See* Special Project, *supra* note 8, at 927.

pressure of formal complaint and trial proceedings have been necessary to affect progress toward the achievement of goals outlined in the original decree adopted by the court more than ten years ago. This is because the problems involved in school reform are essentially political, and for courts to be effective in this setting, they need more influence over powerful interest groups within state and school district bureaucracies. The courts need more power to secure and dictate the distribution of funds and the capacity to punish nonconformity with their orders in ways that would pose a real threat to recalcitrant officials. In short, the courts will have to function in a manner incompatible with the role of the judiciary in the United States' form of government.[101]

As presently constituted, the courts have been a powerful force in establishing the rights of special groups. Their actions during the past several decades have had significant moral and social effects. It has also been suggested that in assessing the institutional impact of court ordered reform, one should attend to the cumulative effects of cases brought in the cause of distributive justice, rather than to the history of any one case.[102] While this observation is valid, and while this case study suggests that the courts may be able to force institutions to comply with the letter of the law, or encourage the parties to reach formal settlements reflecting the intent of court orders, this study also suggests that, unless government officials, elite groups within the bureaucracy, and the public vigorously support institutional change, the courts can have only limited success in altering the operating philosophies and organizational practices that finally determine the quality of service and treatment provided to disadvantaged classes.

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[101] D. HOROWITZ, *supra* note 6, at 298.
[102] See Rebell, *supra* note 36, at 355.